Supreme Court, U.S.
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No. 96-5

In The

Supreme Court of the United States

October Term, 1995

IDA NELKIN PANZER AND
NEWTON B. SCHWARTZ,

Petitioners,

v.

BEA NELKIN, JOELLEN SNOW,
AND JOHN HUTCHINSON,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First Judicial District Of Texas At Houston

BRIEF OF RESPONDENT JOELLEN SNOW IN OPPOSITION

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22 pp

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE JUDGMENTS OF A TEXAS COURT OF APPEALS AND THE SUPREME COURT OF TEXAS IN THIS CASE BY WRIT OF CERTIORARI, IT BEING RESPONDENT'S POSITION THAT NO FEDERAL QUESTION IS INVOLVED IN THIS CASE?

B. ASSUMING THIS COURT'S JURISDICTION, WHETHER THE TRIAL COURT'S REFERENCE (DURING THE COURT'S OPENING STATEMENTS TO PROSPECTIVE JURORS) TO JURY TRIALS DATING BACK "TO THE TIME OF CHRIST", AND A REFERENCE BY RESPONDENT SNOW'S COUNSEL TO "SEVEN ACRES JEWISH GERIATRIC CENTER" DURING VOIR DIRE VIOLATED THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS, WHO ARE JEWISH?

C. ASSUMING JURISDICTION, WHETHER THE DRAFTING BY RESPONDENT SNOW'S COUNSEL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY THE TRIAL JUDGE DENIED PETITIONERS DUE PROCESS OF LAW?

D. ASSUMING JURISDICTION, WHETHER THE STRIKING OF TWO PROSPECTIVE JURORS BY RESPONDENT'S COUNSEL IN EXERCISING PEREMPTORY CHALLENGES VIOLATED PETITIONER PANZER'S RIGHT TO A FAIR AND IMPARTIAL JURY OF HER PEERS?

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I.

MISSTATEMENTS OF FACT BY PETITIONERS

In their Petition for a Writ of Certiorari, the Petitioners make misstatements of fact which should be called to the attention of the Court. Such misstatements of fact include the following:

1. Petitioners state that "Respondent's Counsel admittedly 'ghostwrote' Findings of Fact, Conclusions of Law, Orders and Judgments." (Petition, Pg. 4). Respondent Snow will stipulate (and has stipulated below) that the typewritten pages which constitute the Findings of Fact and Conclusions of Law by the trial court were typed in the office of Joseph S. Horrigan, Respondent Snow's counsel of record. Respondent Snow will *not* stipulate, and emphatically denies, that the Findings of Fact and Conclusions of Law rendered by the trial court were "ghostwritten" by her counsel, which implies that the trial court did not exercise independent thought.

2. Petitioners, in referring to the Findings of Fact of the trial court, state: "In the case at bar the Findings were clearly erroneous and unsupported." (Petition, Pg. 12). On the contrary, the Court of Appeals' opinion states: "The trial court's findings of fact and conclusions of law are well supported by the record." (Petition, Appendix A, at Pg. 36a).

II.

RESPONDENT SNOW'S STATEMENT OF THE CASE

Respondent Snow adopts the factual statements set forth in the opinion of the court of appeals, set forth in Appendix A to the Petition, as her own statement of the case.

III.

REASONS FOR DENYING THE WRIT

A. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CASE AND, ACCORDINGLY, THIS COURT'S JURISDICTION CANNOT BE INVOKED UNDER 28 U.S.C. § 1257.

B. THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS, WHO ARE JEWISH, WERE NOT VIOLATED BY THE INNOCUOUS REFERENCE OF THE TRIAL COURT TO JURY TRIALS DATING BACK "TO THE TIME OF CHRIST" NOR BY A REFERENCE BY RESPONDENT SNOW'S COUNSEL DURING VOIR DIRE TO "SEVEN ACRES JEWISH GERIATRIC CENTER", WHICH IS THE CORRECT NAME OF THE NURSING HOME WHERE GLADYS NELKIN RESIDED.

C. PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY THE DRAFTING BY RESPONDENT SNOW'S COUNSEL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY THE TRIAL JUDGE.

D. THE STRIKING OF TWO MINORITY PROSPECTIVE JURORS BY RESPONDENT SNOW'S COUNSEL IN EXERCISING PEREMPTORY CHALLENGES DID NOT DENY PETITIONER PANZER HER RIGHT TO A FAIR AND IMPARTIAL JURY OF HER PEERS.

IV.

ARGUMENTS AND AUTHORITIES

A. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CASE AND, ACCORDINGLY, THIS COURT'S JURISDICTION CANNOT BE INVOKED UNDER 28 U.S.C. § 1257.

This is a controversy which turns purely on questions of Texas law, none of which involve any issue arising under the Federal Constitution, regardless of Petitioners' efforts to convince this Court to the contrary.

The real questions before the state courts below, insofar as they are germane to Petitioners' contentions that issues arising under the U.S. Constitution are involved, were as follows:

1. Whether Petitioners' complaints about statements of the trial judge and statements by opposing counsel during voir dire of the jury were rendered moot when Respondent Snow's motion for mistrial (based upon conduct by Petitioners during voir dire) was granted?

2. Whether Petitioner Panzer properly preserved her complaints upon constitutional grounds in the courts below, when the only petitioner to raise such complaints in the Texas Court of Appeals and the Supreme Court of Texas was Petitioner Schwartz, who was Petitioner Panzer's attorney in the trial court?

3. Whether Petitioners met their burden of proof at the evidentiary hearing conducted by the trial court on Petitioners' complaint that counsel for Respondent Snow had struck minority prospective jurors for racially motivated reasons?

4. Whether Petitioners waived any complaints concerning the Findings of Fact and Conclusions of Law entered by the trial court, by failing to submit specific, proposed Findings of Fact and Conclusions of Law themselves?

5. Whether the Findings of Fact and Conclusions of Law signed by the trial court are supported by the evidence?

Each of the five (5) questions enumerated above was expressly dealt with by the Texas appellate courts, and each question was resolved in favor of Respondent Snow. A brief summary of the disposition of these issues is as follows:

1. **Statements During Voir Dire**. In its opinion, the Court of Appeals expressly addressed Petitioners' contentions concerning statements to the jury panel during voir dire by the trial judge and counsel for Respondent Snow, with this holding:

> "Schwartz's assertions that the trial judge and Horrigan attempted to 'poison' the jury panel against Panzer and that Horrigan struck two jurors for racially-motivated reasons are not supported by the record. Even if the record supported these allegations, however, there would be no reversible error. The trial judge denied Schwartz's motion for a mistrial, but *granted* Horrigan's motion for a mistrial. The relief appellants sought was granted. We cannot see how appellants could possibly be harmed by the trial court's action." (Petition, Appendix A, at Pg. 26a).

2. **No Preservation of Constitutional Complaints**. Likewise, the Court of Appeals held that Petitioner

Schwartz (who was the only Petitioner to challenge statements during voir dire when an appeal was taken) did not have standing to raise that issue, with this language:

> "We further agree with Snow that Schwartz has no standing to raise this issue. He was not a party to the litigation; only Panzer was in a position to be affected by the trial court's rulings on these matters. We overrule Schwartz's third and fourth points of error." (Petition, Appendix A, at Pg. 26a).

3. **Burden of Proof – Striking Minority Jurors.** When Petitioners took the position in the trial court that two prospective jurors had been improperly struck by counsel for Respondent Snow in exercising peremptory challenges, the trial court conducted an evidentiary hearing. An excerpt from that hearing appears as Appendix I to the Petition, at Pages 68a through 83a. The only testimony at that hearing was the testimony of Mr. Horrigan, counsel for Respondent Snow, who testified that his reasons for striking the two prospective jurors in question were: (a) the relatively low socio-economic status of one juror; and (b) an unpleasant experience which the other juror had in the past with an attorney. Based upon that evidence, the trial court held that the strikes were not race-related. (Petition, Appendix I at Pages 81a through 83a). No evidence was offered to the contrary.

4. **Waiver Concerning Findings of Fact and Conclusions of Law.** The law in Texas is clear that, in order to preserve error on appeal concerning Findings of Fact and Conclusions of Law by the trial court, a party must file a request for "*specified* additional or amended findings or conclusions." (Tex. R. Civ. P. 298, emphasis added). After

the trial court signed the Findings of Fact and Conclusions of Law in this case, Petitioners filed a document entitled "First Request for Findings of Fact and Conclusions of Law . . . ", which appears as Appendix O to the Petition, at Page 106a. Nowhere in this so-called "Request" did the Petitioners set forth any proposed specific findings or conclusions that they wished the trial court to make, thus rendering their "Request" fatally defective under Texas procedural rules. Under Texas case law, additional findings and conclusions are required to be made only when they relate to ultimate or controlling issues. *Texas Eastern Transmission Corp. v. Sealy Ind. School District*, 572 S.W.2d 49, 51 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ). Texas law is also clear that requested findings and conclusions which do no more than request explanations of the court's ruling in the case need not be considered by the trial court. *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Crain v. Southern Warehouse Corp.*, 612 S.W.2d 283, 284 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ).

5. **Findings and Conclusions Supported by the Evidence**. The Findings of Fact and Conclusions of Law made by the trial court are set forth in their entirety in the Opinion of the Court of Appeals (Petition, Appendix A, at Pages 27a through 35a). Such findings and conclusions are absolutely devastating to Petitioners' position, and conclusively demonstrate why death penalty sanctions were imposed in this case. The Court of Appeals' holding with respect to such findings and conclusions was that the "trial court's findings of fact and conclusions

of law are well supported by the record." (Petition, Appendix A, at Pg. 36a).

Rule 10 of the Rules of this Court sets forth the standard for review concerning the Petition in the instant case: "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

There being no substantial federal question before this Court, Respondent Snow respectfully moves that the Petition be dismissed, on the ground that this Court has no jurisdiction with respect to the matters raised therein.

B. THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS, WHO ARE JEWISH, WERE NOT VIOLATED BY THE INNOCUOUS REFERENCE OF THE TRIAL COURT TO JURY TRIALS DATING BACK "TO THE TIME OF CHRIST" NOR BY A REFERENCE BY RESPONDENT SNOW'S COUNSEL DURING VOIR DIRE TO "SEVEN ACRES JEWISH GERIATRIC CENTER", WHICH IS THE CORRECT NAME OF THE NURSING HOME WHERE GLADYS NELKIN RESIDED.

The complete statement of the trial judge about which Petitioners complain was made to the general panel of prospective jurors at the commencement of voir dire, and was as follows:

> "Good morning. I am Judge Bill McCulloch, Judge of Probate Court Number 4 of Harris County. Today we are here to try a lawsuit involving an Estate. The parties have requested a jury trial and that is why you are here.

> "The right to a trial by jury of impartial peers is inherent in our system of justice. It is my understanding that jury trials date clear back to the time of Christ. In fact, in early Greece juries consisted of 201 people and to qualify for a jury you had to be at least 60 years of age." (Petition, Appendix G, Pg. 65a).

The statement to the general panel of prospective jurors by Mr. Horrigan, counsel for Respondent Snow, about which Petitioners complain, is as follows:

> "Mrs. Nelkin resided in her final days in a geriatric center here in Houston, called the Seven Acres Jewish Geriatric Center. Does that ring any bells? Has anybody ever had any personal experience with Seven Acres; any friends or relatives either working there or spent time there or lived there?" (Petition, Appendix H, Pg. 66a).

Pursuant to a Motion in Limine filed prior to trial by Petitioners, the trial judge had ruled that no reference should be made to the fact that Petitioner Panzer and her husband and Petitioner Schwartz were Jewish. *It is undisputed that the correct name of the nursing home where Gladys Nelkin resided was: "Seven Acres Jewish Geriatric Center." There is no evidence in the record that the residents of Seven Acres Jewish Geriatric Center were all Jewish.*

Aside from the fact that Snow's Motion for Mistrial concerning Petitioners' conduct during voir dire was granted, thus rendering their complaint on this point moot, it is perfectly obvious that the contention of Petitioners that the general jury panel was "poisoned" by the above innocuous remarks is totally frivolous and without merit. The trial judge's comments, which reference not only the "time of Christ" but jury trials in ancient Greece,

could not have been more harmless. One need only remember that this year is 1996 *A.D.* (as opposed to *B.C.)* to recognize that "the time of Christ" has historical significance separate and apart from religious beliefs.

With regard to counsel's reference to the "Seven Acres Jewish Geriatric Center", Appendix H to the Petition sets forth the reason why it was necessary to mention the name of the nursing home in question. After Petitioner Schwartz objected and moved for a mistrial, counsel for Respondent Snow stated:

> "Your Honor, I can't take away the name of the organization. I believe the Court's rule [ruling] was that I would make no reference to the fact that Mrs. Panzer is Jewish, and I do not intend to make any reference to that.
>
> "But we have witnesses coming in from that very institution, who work there. They have to identify themselves. They have got to say where they work. They can't lie." (Petition, Appendix H, Pg. 67a).

Petitioners' argument on this point is tantamount to a contention that references to "Southern Methodist University" or to "Methodist Hospital of Houston" in a voir dire examination must necessarily mean: (a) that all students at Southern Methodist University are Methodists; or (b) that all patients at Methodist Hospital are Methodists, thereby somehow prejudicing a party to a lawsuit who does not wish to be identified as a Methodist. That is absurd.

C. PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY THE DRAFTING BY RESPONDENT SNOW'S COUNSEL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY THE TRIAL JUDGE.

In the instant case, the Findings of Fact and Conclusions of Law were signed by the trial judge on October 11, 1991. Thereafter, Petitioner filed a document on October 16, 1991, purporting to request additional and/or amended Findings of Fact and Conclusions of Law. The trial court obviously gave due consideration to the request by the Petitioner for additional Findings and Conclusions. On December 10, 1991, the trial judge signed its "Order Denying Request for Additional and/or Amended Findings of Fact and Conclusions of Law", in which it expressly found that the Request filed by the Petitioners was "a request for an explanation of why the court ruled as it did and thus not a proper request under Rule 298 [Tex. R. Civ. P.] for additional findings and conclusions on a point relating to an ultimate issue or controlling issue in the case" [Citing *Dura-Stilts Co. v. Zachry*, supra]. A copy of the Court's Order of December 10, 1991 is included herein as Respondent's Appendix 1. Neither Respondent Snow nor her counsel had anything whatsoever to do with the preparation of that Order.

Texas law has never deviated from the proposition that it is not reversible error for a trial court to delegate the drafting of its findings and conclusions to an attorney in the case. *Berkman v. D.M. Oberman Mfg.*, 230 S.W. 838, 840-841 (Tex. Civ. App. – Austin 1921, writ dism'd); *First Nat'l Bank v. Skidmore*, 30 S.W. 564, 566 (Tex. Civ. App. 1895, no writ).

The only cases cited by Petitioners in urging a due process violation are *Anderson v. Bessemer City*, 470 U.S. 564 (1984), and *In Re: Colony Square*, 819 F.2d 272 (11th Cir. 1987). Even the Petitioners concede that *Anderson v. Bessemer City*, supra, does not support their position. That case recognized the rule that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Id. at 572. The same rule was acknowledged by the court in the *Colony Square* case, supra, where the court concluded that the trial judge "did not abdicate his adjudicative role", and cited *Anderson v. City of Bessemer*, supra. Id. at 276. See also *In Re: Wolverton Assoc.*, 909 F.2d 1286, 1292 (9th Cir. 1990). The Texas Court of Appeals in the instant case expressly held that the "trial court's findings of fact and conclusions of law are well supported by the record." (Petition, Appendix A, at page 36a). Thus, the "clearly erroneous" standard applied by the federal courts has been satisfied.

D. THE STRIKING OF TWO MINORITY PROSPECTIVE JURORS BY RESPONDENT SNOW'S COUNSEL IN EXERCISING PEREMPTORY CHALLENGES DID NOT DENY PETITIONER PANZER HER RIGHT TO A FAIR AND IMPARTIAL JURY OF HER PEERS.

As has been mentioned above, a mistrial was ordered by the trial court as a result of improper conduct on the part of Petitioners. Thus, while it was Respondent Snow's Motion for Mistrial that was granted, rather than the Petitioners' Motion, the Petitioners received the relief that they requested in contending that the peremptory strikes

by Respondent Snow's counsel were racially motivated. In the language of the Texas Court of Appeals, "[w]e cannot see how appellants [Petitioners] could possibly be harmed by the trial court's action." (Petition, Appendix A, at page 26a).

Petitioners' own sanctionable conduct was the sole cause of their case not being tried by a fair and impartial jury of their peers. This Court has expressly held that "death penalty" sanctions imposed by a trial court will not be disturbed on appeal in the absence of an abuse of discretion. *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The same rule prevails in Texas, and was applied in this case. *Transamerican Nat'l Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991). The Court of Appeals addressed the issue with this language:

> "The trial judge determined that appellants [Petitioners] conducted this litigation in a manner that was apparently intended to protract the litigation and harass Snow. We cannot find that the trial court abused its discretion in striking Panzer's pleadings." (Petition, Appendix A, Pg. 36a).

CONCLUSION

Respondent Snow respectfully submits that this Court has no jurisdiction in this matter because no substantial federal question is involved, and moves for dismissal on that basis. In the alternative, she requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX I

No. 237,361

ESTATE OF	§	PROBATE COURT
GLADYS NELKIN	§	NUMBER FOUR
N.C.M.	§	HARRIS COUNTY, TEXAS

ORDER DENYING REQUEST FOR ADDITIONAL AND/OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 24th day of September, 1991, Movants Ida Panzer, Newton B. Schwartz, Newton B. Schwartz, P. C. and Schwartz, Berger and Valdez P.C. ("Movants") filed two pleadings, one entitled "First Request for Findings of Fact and Conclusions of Law" and the other entitled "First Request for Findings of Fact and Conclusions of Law Including Omitted Findings upon Which Order for Severance and Order Imposing Sanctions per Rule 296 et seq T.R.Civ. P. (Final Judgments)". On October 11, 1991, this court signed its Findings of Fact and Conclusions of Law and provided all counsel with a copy of said findings.

On October 16, 1991, Movants, excluding Schwartz, Berger & Valdez P.C., filed "Ida Panzer et al Request for Additional and or Amended Findings of Fact and Conclusions of Law per Rule 298 T.R.Civ. P." asking for specific facts or specificity with regard to what Movants "have done wrong . . . or the reasons, singly or cumulative, for the Courts' actions" (sic). The court finds that this is a request for an explanation of why the court ruled as it did and thus not a proper request under Rule 298 for additional findings and conclusions on a point relating to an

ultimate or controlling issue in the case. See *Dura-Stilts Co. v. Zachry* (App. 1 Dist. 1985) ___697 S.W.2d 658, ref. n.r.e. Costs associated with this order are waived.

SIGNED THIS 10 day of December, 1991.

/s/ William C. McCulloch
JUDGE PRESIDING